



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 14, 2013

Ms. Cathy Cunningham  
Counsel for City of Keller  
Boyle & Lowry, L.L.P.  
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Irving, Texas 75062-2763

OR2013-00786

Dear Ms. Cunningham:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 475847 (No. 215-12).

The City of Keller (the "city"), which you represent, received a request for the city's current electricity contract and any contracts with a third party used for procuring electricity. You believe the requested information may be excepted from disclosure under section 552.110 of the Government Code. You also believe the requested information may implicate the proprietary interests of the Public Power Pool (the "Power Pool"), Reliant Energy Solutions, LLC ("Reliant"), and the Texas General Land Office (the "GLO"). You inform us the Power Pool, Reliant, and the GLO were notified of the present request for information and of their right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> We received correspondence from the GLO. We have considered the GLO's arguments and reviewed the information you submitted.

We first note section 552.110 of the Government Code, which you raise, protects the interests of third parties rather than those of governmental bodies. Therefore, we do not address the city's claim under section 552.110.

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<sup>1</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

The GLO claims section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects a governmental body’s interests in connection with competitive bidding and certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The GLO asserts it has specific marketplace interests in the information at issue because it is authorized by statute to “sell or otherwise convey power or natural gas generated from royalties taken in kind[.]” Util. Code § 35.102. The GLO advises that under the authority of subchapter D of chapter 35 of the Utilities Code, it has created the State Power Program, through which it bids on contracts for the right to sell electrical energy to public retail customers. The GLO states it competes with other private companies for the awards of these contracts. Based on these representations, we find the GLO has demonstrated it has specific marketplace interests and may be considered a “competitor” in the marketplace for purposes of section 552.104. *See* ORD 593.

The GLO contends the release of the submitted information would harm its marketplace interests because the information at issue details the services and the prices the GLO charges for such services in order to provide the city with its electrical energy needs. The GLO argues that if its competitors had access to this information, they would “be able to use the GLO’s methods of delivery of electrical services and its pricing formula for such services as their own.” Thus, the GLO contends that allowing competitors access to the submitted information would “place the GLO at a competitive disadvantage in the electrical energy marketplace.” Based on the GLO’s representations, we conclude the GLO has shown release of the submitted information would cause specific harm to the GLO’s marketplace interests. *See* ORD 593. We therefore conclude the city may withhold the submitted information on behalf of the GLO under section 552.104 of the Government Code.<sup>2</sup>

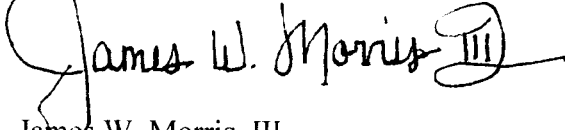
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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<sup>2</sup>As we are able to make this determination, we need not address the GLO’s other arguments against disclosure.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/bhf

Ref: ID# 475847

Enc: Submitted documents

c: Requestor  
(w/o enclosures)

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